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IN THE

Supreme Court of the United States

October Term, 1963.

No. 1044

EASTERN EXPRESS, INC.,

Petitioner,

—against—

MACK WAREHOUSE CORPORATION and EAVENSON & LEVERING COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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—against—

MACK WAREHOUSE CORPORATION AND EAVENSON & LEVERING COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Eastern Express, Inc., your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this cause.

OPINIONS BELOW.

The opinion of the District Court has not been reported. It is set forth at pp. 194a-200a of the "Appellant's Appendix" filed by petitioner in the Court of Appeals. (Said Appendix is hereinafter referred to as the "Record.")

The opinion of the Court of Appeals has been reported at 326 F. 2d 554. A copy is appended hereto as Appendix I.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 8, 1964 (*infra*, Appendix II). A petition for rehearing was denied on February 11, 1964 (*infra*, Appendix III). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A. Section 1254(1).

QUESTIONS PRESENTED.

This case poses several questions concerning the meaning of Rule 36 of the Federal Rules of Civil Procedure which have not been, and which should be, decided by this Court, namely:

1. Is the provision in Rule 36 that a "sworn statement denying specifically the matters of which an admission is requested" a technical requirement that can be dispensed with even though the party to whom the request for admissions was directed does not allege or prove any excusable neglect for failing to sign and swear to the "statement denying" the matters of which admission was requested?

2. Under Rule 36, does the party who seeks admission of matters under the Rule have the burden of obtaining compliance by the other party with the Rule prior to trial and bringing to the attention of the trial court the fact that there has not been compliance, or, on the other hand, assuming the requests for admission are proper under the Rule, is no further action required of the party requesting the admissions and are the matters requested to be admitted to be deemed admitted unless the other party meets the burden of responding in compliance with the provisions of the Rule?

3. May a party under Rule 36 properly request the admission of relevant but controversial, or underlying or crucial, factual matters?

4. Are admissions made or deemed made under the Rule conclusive?

RULE 36.

Rule 36 of the Federal Rules of Civil Procedure reads as follows:

"(a) Request for Admission. After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If a plaintiff desires to serve a request within 10 days after commencement of the action leave of court, granted with or without notice, must be obtained. Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith re-

quires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder.

(b) Effect of Admission. Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding."

STATEMENT OF THE CASE.

Petitioner instituted this action against respondents in the United States District Court for the Eastern District of Pennsylvania to recover damages for fraud. The jurisdiction of the District Court was based upon the diversity of citizenship existing between petitioner on the one hand and respondents on the other.

Petitioner claimed that in building a truck terminal on land which it had purchased from respondents it had incurred construction costs which would not have been incurred had the soil been "firm and virgin" rather than filled in with debris. As the Circuit Court in its opinion points out, "It is agreed that the seller's agent, Foyle, knew" that the land was desired by petitioner, "a common carrier by motor vehicle, for the construction of a truck terminal . . . ." and "Foyle also knew that the tract had once been the site of a brickyard and that it had been excavated to provide clay for brick and later filled." Petitioner's testimony that it would not have purchased the land had it known of the brickyard excavations (Record p. 106a) was not disputed. One issue in the case was whether or not respondents were guilty of actionable non-disclosure of material information. This issue was

> ". . . whether a proximate cause of plaintiff's purchase of the land was defendants' failure, after being informed that plaintiff needed firm ground for its contemplated truck terminal use, to disclose to plaintiff, during the negotiations leading up to the sale and purchase agreement . . . that the land had been used as a brickyard, excavated in the course of brickyard operations and subsequently filled in."

(Petitioner's brief before the Court of Appeals, p. 6).

Petitioner served respondents; prior to the trial, with requests for admission of facts under Rule 36 of the Federal Rules of Civil Procedure (Record, pp. 12a-15a). Petitioner requested that respondents admit the following:

(1) That prior to execution of the agreement for the purchase of the land in question, petitioner had inquired of respondents whether the subsoil was virgin;

(2) That prior to the execution of the purchase agreement the premises had been used as a brickyard and had been excavated and thereafter filled in, all of which was known by respondents at the time of the negotiations for the sale of the premises to petitioner;

(3) That prior to the execution of the purchase agreement petitioner had received no notice, written or oral, from respondents that the premises had previously been excavated and thereafter filled with debris;

(4) Visual examination of the premises would not reveal that the land had been excavated and thereafter filled; and

(5) Prior to the execution of the purchase agreement, petitioners had made it known to respondents that petitioner intended to construct a truck terminal building on the land, and respondents knew that the character of the subsoil was a material factor in the employment of the land as a truck terminal.

(Record, pp. 12a-13a)

If these matters requested to be admitted are to be deemed, because of the provisions of Rule 36, to have been admitted, then, Pennsylvania law—the negotiations for purchase of the land were conducted in Philadelphia—re-

quires the conclusion that respondents had been guilty of actionable non-disclosure of material information. In Pennsylvania,

> "The deliberate non-disclosure of a material fact amounts to culpable misrepresentation no less than does intentional affirmation of a material falsehood."

Neuman v. Corn Exchange National Bank & Trust Co., 356 Pa. 442, 51 A. 2d 759, 764 (1947). When specific inquiry is made about a matter, the non-disclosure of relevant information by the party to whom inquiry is made is actionable fraud. *Copper Process v. Chicago Bonding Ins. Co.*, 262 F. 66 (3 Cir. 1920). The misrepresentation or non-disclosure by one party need not be the sole cause of action the complaining party takes; it is enough if reliance on what the defendant says or does not say is a "substantial factor" in inducing the action taken by the complaining party. *Neuman v. Corn Exchange National Bank & Trust Co.*, 356 Pa. 442, 51 A. 2d 759 (1947); *Seaboard Surety Company v. Permacrete Construction Corp.*, 221 F. 2d 366 (3 Cir. 1955). And it is

> "to be presumed from the very materiality of the misrepresentation that the person deceived relied upon it (Restatement, Contracts, Sec. 479) . . ."

La Course v. Kiesel, 366 Pa. 385, 77 A. 2d 877, 880 (1951).

When the trial began, petitioner asked the District Court that the matters requested to be admitted be deemed admitted (Record, p. 21a). The statement served by respondents upon petitioner and purporting to contain answers to the requests for admission was signed by respondents' attorneys. The statement was not signed or sworn to by respondents themselves (Record, p. 19a).

Respondents did apply to the District Court for permission to file, on the second day of the trial, signed and verified answers complying with the requirements of Rule 36.

However, respondents did not seek to prove or prove at the trial—indeed, they did not even claim—that the original failure to sign and swear to their answers and to comply with Rule 36 was due to "excusable neglect" within the purview of Rule 6(b) of the Federal Rules of Civil Procedure.

However, the District Court denied petitioner's motion under Rule 36. The District Court stated:

> "I will consider that what counsel did on behalf of his client, if there was no objection made at the time those answers were filed to the fact that they were not signed by the client, will be regarded as the answer of the client . . . I say, if you have a point like that to raise, you raise it preliminarily . . . I will not regard as an admission your request for admission, simply because the answers were not signed by the defendants or sworn to by the defendant . . . simply because it was not in compliance with the formalities."

(Record, p. 22a p. 23a, p. 25a). Trying the case without a jury, the District Court entered judgment for respondents.

On petitioner's appeal, the Circuit Court affirmed the judgment of the District Court, and denied petitioner's petition for a rehearing (Appendices II and III, *infra*). In its decision, the Circuit Court relied on testimony given by Foyle, respondent's agent during the negotiations, described by the Circuit Court as being "not contradicted,"* to the effect that during the negotiations Foyle had offered to have soil test borings made but petitioner's agent had rejected the offer. The Circuit Court held that this testimony permitted the District Court to conclude that petitioner was not relying on respondents for information concerning subsoil conditions.

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* The testimony was, however, not only contradicted by petitioner's negotiating agent, it was also contradicted by other testimony given by Foyle himself. Record, pp. 169a-170a, p. 80a.

If, however, Rule 36 means what it literally says—if the matters of which petitioner requested admission "shall be deemed admitted" because the respondents' purported denial of these matters was neither signed nor sworn to by respondents—then, the District Court was precluded from finding, contrary to respondents' own admission, that petitioner had purchased the land in the belief the soil was firm without relying on respondents for that belief. That is, respondents had admitted, if Rule 36 means what it says literally, that petitioner had asked if the land were "virgin"; that respondents knew it was filled in land; that respondents knew that petitioner wanted the land for truck terminal use, and that the character of the subsoil was a material factor; and that petitioner had not known before contracting to buy the land that it had been excavated and filled in. The very materiality of what was not disclosed compels the conclusion that petitioner had relied on respondents' silence after petitioner had expressly asked if the soil were firm. *La Course v. Kiesel*, 366 Pa. 385, 77 A. 2d 877 (1951).

At least, if the Circuit Court had given careful consideration to the Rule 36 issue in this case, it could not so summarily have held that the District Court's conclusion, adverse to petitioner on the non-disclosure issue, was justifiably reached on the basis of certain testimony by respondents' agent, testimony that was inconsistent with the admissions made by respondents as a result of the operation of Rule 36.

That Rule 36 was an issue on the appeal was brought to the attention of the Circuit Court in the briefs filed by petitioner. The Circuit Court dealt with Rule 36 by not dealing with it. The Circuit Court's opinion does not mention Rule 36.

ARGUMENT FOR ALLOWANCE OF WRIT.

This case raises several questions that are important to the functioning and future of Rule 36 of the Federal Rules of Civil Procedure. Is Rule 36 to be construed liberally so as to encourage its utilization? The District Court thought not. In fact, the District Court refused to accept the rule as even going so far as literally its language permits. The rule expressly provides that

> "Each of the matters of which admission is requested shall be deemed admitted unless . . . the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny these matters, or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant, or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time."

But the District Court held that the requirement that specific denials be in the form of a "sworn statement" was a mere formality the disregard of which could be overlooked. The District Court further held that the party who serves a request for admissions under Rule 36 has the burden of calling to the attention of the trial court prior to trial the fact that the other party has failed to comply with the rule and that denials served in response to the rule are not signed or sworn to. Yet Rule 36 literally casts on the party receiving a request for admissions the entire burden of avoiding the admission of any matters of which admission is requested.

The Circuit Court, in affirming the District Court, has sanctioned the District Court's interpretation of the rule, although the rule is not discussed in the Circuit Court's opinion. The attitude of the two courts below toward Rule 36, articulated or not, is not universal. The Circuit Court of Appeals for the Seventh Circuit has stated that when a "sworn denial" is not served in response to a request for admission,

> ". . . it seems clear that the matters requested stood admitted and *required no further proof on the part of plaintiff. Rule 36 requires affirmative action by the party on whom the request is made.* If the requests are proper, *no further action is required of the party making the same*, but *the matters are deemed admitted* unless the *other party* responds in accordance with the terms of the rule."

Water Hammer Arrester Corporation v. Tower, 171 F. 2d 877, 879 (7 Cir. 1949, emphasis added). A district court in a well-reasoned opinion has followed the approach of the Seventh Circuit and held that the verification requirement for answers to a Rule 36 request for admissions "is not a mere technicality," and that one who has submitted a Rule 36 request does not waive the requirement of verification by not raising the question prior to trial. *Beasley v. United States*, 81 F. Supp. 518, 528 (E. D. S. C. 1948).

This case also raises the issue of whether Rule 36 permits one party to request admissions of relevant but controversial, or underlying and crucial, factual matters. Some District Courts have held that Rule 36 does not extend to matters which, if admitted, would dispose of the litigation or of factual issues which are in dispute. *Demmert v. Demmert*, 115 F. Supp. 430 (D. Alaska, 1953); *In Re Reinauer Oil Transportation, Inc.*, 19 F. R. D. 5 (D. Mass. 1956). But other courts have noted that Rule 36 provides that a request may be served for the admission of the truth

of "any relevant matters of fact . . . ." *United States v. Wiman*, 304 F. 2d 53 (5 Cir. 1962); Moore, *Federal Practice*, Supplement to Vol. 4, p. 156.

Further, this record poses the question whether or not admissions under Rule 36 are conclusive as against the party making or charged with making them. See Moore, *Federal Practice*, Supplement to Vol. 4, p. 167.

Rule 36 could be one of the most useful tools provided by the Federal Rules of Civil Procedure. The procedure furnished by it for obtaining admissions "offers great possibilities toward facilitating the proof at the trial by weeding out facts and items of proof over which there is no dispute, but which are often difficult and expensive to prove." Moore, *Federal Practice*, Vol. 4, p. 2705. The use of Rule 36 should not be hampered by any uncertainty. This Court has never ruled on the Rule 36 issues raised by this record. The importance of delineating the circumstances under which tardy filing of answers or other deviation from express requirements will be permitted under Rule 36 and similar state rules has been recognized. 93 A. L. R. (2d) 757.

It would appear that in recent years this Court has not been reluctant to grant certiorari in connection with issues arising under the Federal Rules of Civil Procedure. See, for example, *La Buy v. Howes Leather Co., Inc.*, 352 U. S. 249, 77 S. Ct. 309 (1957), rehearing den., 352 U. S. 1019, 77 S. Ct. 553 (1957); *Polites v. United States*, 364 U. S. 426, 81 S. Ct. 202 (1960). And this Court has emphasized that:

> "The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure . . . ."

and these deposition and discovery rules "are to be accorded a broad and liberal treatment." *Hickman v. Taylor*, 329 U. S. 495, 500, 507, 67 S. Ct. 385, 388, 392 (1947).

Accordingly, it is submitted that the requested writ should issue.

Respectfully submitted.

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APPENDIX I.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,445

EASTERN EXPRESS, INC.,
Appellant

v.

MACK WAREHOUSE CORPORATION and EAVENSON & LEVERING COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 7, 1963

Before: STALEY, HASTIE and SMITH, *Circuit Judges*.

OPINION OF THE COURT

(Filed January 8, 1964)

By HASTIE, *Circuit Judge*.

This is a suit by the purchaser of a tract of land in Philadelphia against the seller for damages caused by alleged deceit in the oral negotiations which brought about the sale. The buyer contends that Samuel Foyle, a Philadelphia real estate broker who acted as the seller's agent, willfully deceived the buyer's agent, David Rosenfeld, an Indiana lawyer, concerning the nature and condition of the subsoil.

The case was tried to a court sitting without a jury. The court found that Foyle had made no affirmative misrepresentations concerning soil conditions, that his failure to volunteer information on the subject was not fraudulent, and that Rosenfeld did not rely upon Foyle in this matter. Pursuant to those findings, judgment was entered for the defendant seller. The buyer has appealed, contending that the evidence does not support the trial court's fact finding.

Of course Pennsylvania principles of liability for deceit are controlling. However, this appeal presents only questions of rational judgment as to the probative value of evidence and of federal practice in appellate review of fact finding.

No one doubts that the appellant can prevail only if he demonstrates on the record that the trial court's fact finding was "clearly erroneous". *United States v. Gypsum Co.*, 1948, 333 U. S. 364; *Seideman v. Hamilton*, 3d Cir. 1960, 275 F. 2d 224. We examine the record with that burden in mind.

The ten-acre tract in question was wanted by the buyer, a common carrier by motor vehicle, for the construction of a truck terminal. It is agreed that the seller's agent, Foyle, knew this. Foyle also knew that the tract had once been the site of a brickyard and that it had been excavated to provide clay for brick and later filled. Subsequently, an emergency public housing project had been built there. But beyond this limited area of agreement, Foyle and Rosenfeld, both of whom testified at length, gave sharply conflicting accounts of their face-to-face negotiations which led to the sale. Rosenfeld testified that he asked Foyle concerning subsoil conditions, pointing out that the contemplated imposition of heavy structures and vehicles on the land required that the soil be "virgin" or "firm", and that Foyle assured him that the soil was firm. However, Foyle denied both that Rosenfeld made any inquiry about soil conditions and that Foyle made any representations in that regard. The court stated its belief

that Foyle's version was correct and found that no representations had been made by him.

The trial occurred some six years after the conversations in question. The stated recollections of the two parties to the conversations were irreconcilably conflicting. Resolution of the issue thus posed depended very largely upon the credibility of the two opposing witnesses, neither of whom was disinterested. In such a situation, only the most persuasive showing of verisimilitude in the rejected testimony of one witness or of falsity in the contradicting testimony credited by the trial court can justify reversal of the trial findings. *Seideman v. Hamilton, supra; cf. Williams v. The Babcock & Wilcox Co.*, 3d Cir. 1959, 262 F. 2d 253.

Appellant urges that because Rosenfeld's testimony was clear, precise and positive, while Foyle was at times a hesitant, vague and even self-contradictory witness, the court acted arbitrarily in refusing to find in accordance with Rosenfeld's account. Rosenfeld was a skilled and experienced courtroom lawyer and undoubtedly testified with the clarity and precision to be expected of such an expert. Foyle, an older man, had enjoyed nearly fifty years of experience in the real estate field, but there is no indication that he was skilled in courtroom presentation. In such circumstances the clearer and more unequivocal testimony is not necessarily the more convincing.

The trial court also indicated its thought that, if assurances concerning soil conditions had been given and were considered important, it seemed strange that able counsel representing the buyer did not incorporate some reference to this matter in the formal agreement of sale. We think a reasonable fact finder could derive at least some slight inferential support for Foyle's version of the negotiations from this omission.

Moreover, since this is a fraud case, the trial court could find for the plaintiff buyer only if the proof of fraudulent misrepresentations was clear and convincing. A mere

preponderance of evidence in favor of plaintiff's factual contentions would not suffice. On the whole record, therefore, we cannot say that the trial judge acted arbitrarily in refusing to find that Foyle had made the representations claimed by Rosenfeld.

Apart from any false statement by Foyle, appellant also contends that, since Foyle knew the buyer wanted the land for a heavy duty truck terminal, he was obligated to disclose, even without any inquiry by Rosenfeld, that the ground was filled rather than virgin. At the outset, it is to be noted that this ground could be and indeed was used for the intended construction of a truck terminal after the buyer learned that it had been filled. The buyer's claim is not that the ground was wholly unsuited for his purposes, but that he has had to bear extra costs for foundations and footings because of subsoil condition. The record does not show whether such extra costs of building on filled land were offset by a relatively low sale price or whether the buyer paid the full market price for virgin land. In any event, the buyer's own course of action shows that the land was adaptable to the intended use. Our problem is whether the seller's failure to volunteer information relevant to a particular problem involved in that adaptation constituted actionable deceit.

Foyle testified that when the intended use of the land was disclosed during oral negotiations he offered to have soil test borings made, but that Rosenfeld rejected this tender, saying that his client had its own engineers to handle such matters. Certainly, such borings would have been a simple normal method of determining soil conditions and judging their bearing upon the intended land use. Indeed, test borings would supply the buyer with more precise and useful data than would be provided by general information that the land had been excavated and filled. Here again the trial court was entitled to believe Foyle's testimony, which, in this respect, was not contradicted, and to conclude from it that Rosenfeld had in-

dicated that he was not relying upon Foyle for information concerning subsoil conditions. In these circumstances, the failure of Foyle to volunteer information concerning the history of the tract could not be actionable deceit.

The appellant has raised other questions on this appeal. We have considered each of them and have found no reversible error.

The judgment will be affirmed.

APPENDIX II.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14,445.

EASTERN EXPRESS, INC.,
Appellant
v.
MACK WAREHOUSE CORPORATION AND
EAVENSON & LEVERING COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: STALEY, HASTIE and SMITH, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed March 15, 1963 in this case be, and the same is hereby affirmed, with costs.

ATTEST:

IDA O. CRESKOFF,
Clerk.

January 8, 1964

APPENDIX III.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14,445.

EASTERN EXPRESS, INC.,
Appellant

v.

MACK WAREHOUSE CORPORATION AND
EAVENSON & LEVERING COMPANY.

ORDER SUR PETITION FOR REHEARING.

Present: BIGGS, *Chief Judge*; and KALOJNER, STALEY, HASTIE, GANEY and SMITH, *Circuit Judges*.

The petition for rehearing filed by Eastern Express, Inc., in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ WILLIAM H. HASTIE,
Judge.

Dated: February 17, 1964